A

WAN YURILLHAMI WAN YAACOB & ANOR

v.

PP

B

FEDERAL COURT, PUTRAJAYA
AUGUSTINE PAUL FCJ
ZULKEFLI MAKINUDIN FCJ
MOHD GHAZALI YUSOFF FCJ
[CRIMINAL APPEALS NOS: 05-100 & 101-2008 (D)]

C

22 OCTOBER 2009

CRIMINAL LAW: *Penal Code - Section 34 - Common intention, definition of - Some act of prior concert or pre-planning to act together - Whether element of "common intention" proven - Plan must precede act*

D

constituting the offence - Pre-planning may develop on spot or during course of commission of offence - Existence of common intention a question of fact to be proved as a matter of inference from circumstances of case

E

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Appeal against conviction - Failure to call informer - Whether prosecution required to call informer as witness or to offer him to defence - Informer's role merely as introducer - Whether informer actually an agent provocateur and must be called as a witness*

F

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in a dangerous drug - Common intention, whether established - Whether there was a pre-arranged plan - Plan must precede act constituting the offence - Pre-planning may develop on spot or during course of commission of offence - Existence of common intention a*

G

question of fact to be proved as a matter of inference from circumstances of case

CRIMINAL PROCEDURE: *Dangerous drugs - Trafficking - Elements - Whether proved - Whether doubt as to identity of drugs – Drug exhibits*

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counted in presence of appellants after arrest - No suggestion of tampering of exhibits - No break in chain of evidence relating to exhibits - Whether adverse inference to be made under s. 114(g) of Evidence Act 1950 against prosecution for not producing search list and police report to clarify identity of exhibits

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EVIDENCE: *Adverse inference - Whether presumption arose - Failure to call informer as witness - Whether there was withholding or suppression of evidence - Whether adverse inference could be invoked against prosecution - Evidence Act 1950, s. 114(g)*

EVIDENCE: *Agent provocateur - Informer, distinguished from - Failure of prosecution to call witness - Whether witness an agent provocateur or mere informer*

EVIDENCE: *Exhibits - Custody of exhibits - Dangerous drugs - Whether doubt as to identity of drugs - Drug exhibits counted in presence of appellants after arrest - No suggestion of tampering of exhibits - No break in chain of evidence relating to exhibits - Whether adverse inference to be made under s. 114(g) of Evidence Act 1950 against prosecution for not producing search list and police report to clarify identity of exhibits*

EVIDENCE: *Witness - Failure of prosecution to call informer as witness - Whether witness an agent provocateur or mere informer - Whether adverse inference under s. 114(g) Evidence Act 1950 could be invoked against prosecution*

The appellants were jointly charged of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s. 34 of the Penal Code ('Code'). SP5 (a police inspector) had received information from an informer that a man had asked the informer to look for a buyer of drugs in the form of "WY" pills. A meeting was fixed between the buyer and the said man. SP7 (a detective sergeant) was assigned as the buyer. A trap was laid. The date and place for the sale of the drugs was agreed with the first appellant. On the agreed date, SP5 and his team proceeded to the agreed location. SP7 and the informer were also there. Both the appellants arrived and entered SP7's car whilst the informer alighted from SP7's car. When SP7 asked about the "barang' the first appellant pointed at the second appellant who then took out from inside his shirt a black plastic bag containing the drugs and handed it over to SP7. Both the appellants were then ambushed and arrested. The first appellant's defence was that it was a trap perpetrated by the informer whom he knew as Seman. It was claimed that Seman was the one who had actually supplied the drugs. The second appellant claimed that he had merely accompanied the first appellant and had no knowledge about the drugs. Both the appellants were convicted and sentenced to death by the High Court and their appeal to the Court of Appeal was dismissed. Hence, this appeal. The

A appeal was based on the two following grounds: (i) that the non-calling of the informer was fatal to the prosecution's case; and (ii) that the identity of the drug exhibits was highly doubtful. Counsel for the appellants claimed that there were discrepancies in the evidence of the prosecution witness in relation to the said drug
B exhibits. The second appellant also claimed that common intention under s. 34 of the Code was not proved.

Held (dismissing the appeal of both the appellants)
Per Zulkefli Makinudin FCJ:

C **(1)** If a person is only an informer, the prosecution is not required to call him as a witness or offer him to the defence. An informer is protected under s. 40 of the Act. On the other hand if a person is an agent provocateur, he is required to give evidence in court as a prosecution witness and if he is
D not called he has to be offered and made available to the defence. Failure to comply with this requirement will attract the application of adverse inference under s. 114(g) of the Evidence Act 1950 ('EA') against the prosecution's case.
E (para 16)

(2) There was no evidence that Seman had done anything apart from introducing SP7 to the first appellant and being present when the transaction involving the drugs took place. Seman's presence if at all was merely to lend credence of SP7's
F intention to purchase the drugs in the minds of both the appellants. Therefore Seman was not an agent provocateur. As such, there was no gap in the prosecution's case as what was available at the close of the prosecution's case was that the informer's role was merely to introduce the first appellant.
G (paras 19 & 20)

(3) There was no doubt created in respect of the identity of the pills. The drug exhibits were counted by SP5 in the presence of both the appellants after they were arrested and there was
H no suggestion of tampering of the drug exhibits. (para 25)

(4) There was no break in the chain of evidence relating to the exhibits. Therefore, the question of whether there was the need for the prosecution to produce the search list and the
I police report to clarify on the identity of the said pills did not arise. No adverse inference under s. 114(g) of the EA should be made against the prosecution for not producing the search list and the police report. (para 26)

(5) A pre-concert or pre-planning may develop on the spot or during the course of the commission of the offence, but the crucial test is that such plan must precede the act constituting the offence. The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case. Although the second appellant was not involved in the negotiation for the sale of the drugs, the prosecution established the common intention between the appellants to commit the offence of trafficking of the said drugs. The pre-arranged plan of the appellants to commit the offence could be inferred by reference to the acts of both of them meeting SP7 and the fact that it was the second appellant who delivered the drugs to SP7. (para 29)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu telah dituduh bersama mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dibaca bersama-sama dengan s. 34 Kanun Keseksaan ('Kanun'). SP5 (seorang pegawai polis) telah menerima maklumat dari seorang informer bahawa seorang lelaki telah meminta informer mencari seorang pembeli bagi dadah dalam bentuk pil-pil "WY". Sesuatu perjumpaan diaturkan di antara pembeli dan lelaki tersebut. SP7 (seorang sarjan detektif) telah ditetapkan sebagai pembeli. Satu perangkap telah dipasang. Tarikh dan tempat bagi penjualan dadah telah disetujui oleh perayu pertama. Pada tarikh itu, SP5 dan pasukannya terus ke lokasi tersebut. SP7 dan informer juga ada di sana. Kedua-dua perayu tiba dan memasuki kereta SP7 sementara informer keluar dari kereta SP7. Apabila SP7 bertanya tentang "barang" perayu pertama menunjuk kepada perayu kedua yang kemudiannya mengambil dari dalam bajunya sebuah beg plastik hitam yang mengandungi dadah dan memberinya kepada SP7. Kedua-dua perayu kemudian diserang hendap dan ditangkap. Pembelaan perayu pertama ialah bahawa ia merupakan suatu perangkap yang dilakukan oleh informer yang beliau kenali sebagai Seman. Ia telah dihujah bahawa Seman yang sebenarnya telah membekalkan dadah itu. Perayu kedua mendakwa bahawa beliau hanya mengikut perayu pertama dan tidak mempunyai pengetahuan tentang dadah itu. Kedua-dua perayu disabit dan dikenakan hukuman mati oleh Mahkamah Tinggi dan rayuan mereka ke Mahkamah Rayuan telah ditolak. Oleh yang demikian, rayuan ini. Rayuan ini berdasarkan dua alasan yang berikutnya: (i) bahawa

A ketidakpanggilan informer adalah fatal kepada kes pendakwaan; dan (ii) bahawa identiti barang kes dadah merupakan sungguh meragukan. Peguam perayu-perayu mendakwa bahawa terdapat perselisihan dalam keterangan saksi-saksi pendakawaan berhubung dengan barang kes dadah itu. Perayu kedua juga menghujah
B bahawa niat bersama di bawah s. 34 Kanun tidak dibuktikan.

Diputuskan (menolak rayuan kedua-dua perayu)
Oleh Zulkefli Makinudin HMP:

C **(1)** Jika seseorang hanya merupakan informer, pendakwaan tidak perlu memanggilnya sebagai saksi atau menawarkannya kepada pembelaan. Seseorang informer dilindungi di bawah s. 40 Akta. Sebaliknya jika seseorang itu adalah agen provocateur, beliau perlu memberi keterangan di mahkamah sebagai saksi pendakwaan dan jikalau beliau tidak dipanggil beliau terpaksa
D ditawarkan atau disediakan bagi pembelaan. Kegagalan untuk memenuhi keperluan ini akan membawa kepada pemakaian inferens bertentangan di bawah s. 114(g) Akta Keterangan 1950 ('AK') terhadap kes pendakwaan.

E **(2)** Tidak ada keterangan bahawa Seman telah melakukan apa-apa selain dari kenalkan SP7 kepada perayu pertama dan hadir semasa transaksi yang melibatkan dadah itu telah berlaku. Kehadiran Seman kalau apa pun adalah hanya untuk membuktikan kebenaran niat SP7 untuk membeli dadah dalam
F minda kedua-dua perayu. Oleh itu Seman bukan seorang agen provocateur. Oleh yang demikian, tidak terdapat jurang dalam kes pendakwaan kerana apa yang ada pada penghujung kes pendakwaan adalah bahawa peranan informer hanya untuk kenalkan perayu pertama.

G **(3)** Tidak ada apa-apa keraguan yang dapat dikemukakan berkenaan dengan identiti pil-pil. Barang kes dadah telah dikira oleh SP5 di hadapan kedua-dua perayu selepas mereka telah ditangkap dan tidak ada apa-apa saranan bahawa barang kes
H dadah itu telah diusik.

(4) Tidak ada pencelahan dalam rangkaian keterangan berhubung dengan barang kes. Oleh itu, soalan sama ada pendakwaan perlu mengemukakan senarai pencarian dan laporan polis untuk
I menjelaskan identiti pil-pil tersebut tidak berbangkit. Tiada inferens bertentangan di bawah s. 114(g) AK yang seharusnya dibuat terhadap pendakwaan kerana tidak mengemukakan senarai pencarian dan laporan polis.

(5) Sesuatu pra-persetujuan atau pra-rancangan mungkin terjadi dalam keadaan itu atau pada masa kesalahan itu dilakukan, tetapi ujian penting ialah bahawa rancangan sebegitu mesti berlaku sebelum tindakan kesalahan itu. Kewujudan niat bersama merupakan satu soalan fakta dan dalam tiap-tiap kes ia mungkin dapat dibuktikan sebagai suatu perkara inferens daripada keadaan kes itu. Walaupun perayu kedua tidak terlibat dalam perundingan untuk penjualan dadah itu, pendakwaan telah membuktikan niat bersama di antara perayu-perayu untuk melakukan kesalahan mengedar dadah tersebut. Pelan pra-rancangan perayu untuk melakukan kesalahan itu boleh didapati secara inferens dengan merujuk kepada tindakan-tindakan mereka berdua menemui SP7 dan fakta bahawa ia adalah perayu kedua yang menghantar dadah itu kepada SP7.

Case(s) referred to:
Ghazalee Kassim & Ors v. PP [2009] 4 CLJ 737 FC
Mahbub Shah v. Emperor AIR [1945] PC 118
Munusamy v. PP [1987] 1 MLJ 492
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC
Suresh v. State of Uttar Pradesh AIR [2001] SC 1344
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC

Legislation referred to:
Dangerous Drugs Act 1952, ss. 40, 40A
Evidence Act 1950, s. 114(g)
Penal Code, s. 34

For the 1st appellant - Sukhaimi Mashud; M/s Teh Poh Teik & Co
For the 2nd appellant - K Viknesvaran (N Ratnavathy with him); M/s Viknes Ratna & Co
For the respondent - Nurulhuda Nur'aini Mohd Nor DPP

[Appeals from Court of Appeal; Criminal Appeal No: D-05-57 & 58-2004]

Reported by Amutha Suppayah

A

JUDGMENT

Zulkefli Makinudin FCJ:

Introduction

B **[1]** Wan Yurillhami bin Wan Yaacob (the first appellant) and Zakaria bin Jusoh (the second appellant) were jointly charged of trafficking in dangerous drugs at the High Court in Kota Bharu. The charge reads as follows:

C > Bahawa kamu bersama-sama pada 1 Ogos, 2001 jam lebih kurang pukul 5.00 petang di tempat letak kereta Hotel Perdana, Jalan Mahmud, Kota Bharu di dalam Daerah Kota Bharu di dalam Negeri Kelantan telah didapati mengedar dadah berbahaya iaitu "methamphetamine" seberat 93.70 gram, dan oleh yang demikian kamu bersama-sama telah melakukan satu kesalahan di bawah
D > seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama dengan seksyen 34 Kanun Keseksaan.

[2] Both the appellants were convicted and were sentenced to
E death by the High Court. Their appeal to the Court of Appeal was also dismissed and hence this appeal before this court.

The Case For The Prosecution

[3] The evidence adduced by the prosecution from the relevant
F prosecution witnesses may be summarized as follows:

[4] On 26 June 2001 Inspector Roslan Haji Yusof @ Mohamed (SP5) received a phone call from an unknown person (the informer) disclosing to SP5 about a drug trafficking activity. SP5
G later met the informer on 6 July 2001 wherein SP5 was informed that a man had asked the informer to look for a buyer of drugs in the form of "WY" pills. SP5 met the informer for a second time on 14 July 2001 where a meeting was fixed between the buyer and the said man. D/Sgn. Maj. Busra bin Abdu. Kadir (SP7) was
H assigned with a job as the buyer.

[5] SP7 was later introduced to the informer who then informed both SP5 and SP7 that the man wanted to meet the buyer at a petrol station in Rantau Panjang. Subsequently SP7 and the informer departed to Rantau Panjang in a Proton Perdana followed
I by SP5 in another car. Upon arrival at the petrol station two men on a bike had approached SP7's car. One of them entered the car

and asked SP7 to follow the rider of the bike to a wooden house. At the wooden house the rider of the bike introduced himself to SP7 as "Yuri" while SP7 introduced himself as "Bob". Yuri was identified by SP7 as the first appellant.

[6] Both SP7 and the first appellant had discussed about supply of some pills. The first appellant then agreed to supply to SP7 three packets of pills at RM14.50 per tablet. He also agreed to contact SP7 as and when he obtained the supply. A few days later SP7 contacted the first appellant to inquire about the pills but the latter responded by telling SP7 to wait for his call. On 31 July 2001 SP7 received a call from the first appellant that the drug was ready and SP7 was requested to get ready with RM50,000. SP7 was then required to wait for the first appellant to meet him at a parking space at Hotel Perdana Kota Bahru at about 4pm. A trap was laid. SP5 and his team proceeded to the location at about 3pm. SP7 and the informer were also there. A car, Volvo WU 9632 later arrived at the Hotel and stopped beside SP7's car. The Volvo was driven by the first appellant. The second appellant was with him. Both the first appellant and the second appellant entered SP7's car. The informer then alighted from the car.

[7] When SP7 asked about the "barang' the first appellant pointed at the second appellant who then took out from inside his shirt a black plastic bag and handed it over to SP7. SP7 examined the contents of the black plastic bag and found two yellowish paper packages. SP7 gave one of the packages to the first appellant. The first appellant opened the package and took out one packet and showed it to SP7. It was a blue packet containing red pills. SP7 then alighted from the car. He gave signals to his team. Both the first appellant and the second appellant were ambushed and arrested.

[8] Upon examining the black plastic bag SP5 discovered two plastic packages which contained items wrapped in yellow paper. Each of the packages contained ten blue plastic packages. Each of the blue packages contained a number of pills suspected to be drug. The total number of pills was 3,985 tablets. It was sent to the Chemist for analysis who confirmed that it contained 93.70 grams of "methamphetamine".

A **The Defence Of The First Appellant**

[9] The first appellant's defence was that it was a trap perpetrated by the informer whom he knew as Seman. Before his arrest he was doing business of selling clothes. He knew Seman
B because at one time Seman used to be his wife's boyfriend. Seman held a grudge against him because he took Seman's girlfriend (SD2) and married her. Seman had introduced him to SP7 who intended to buy jeans from him. Seman had informed him that SP7 also wanted to buy "pil kuda" but he told Seman did not
C want to get involved. On the date of arrest he received a call from Seman who asked him to pick him (Seman) up at Hotel Perdana. The second appellant was with him at that time. Upon arrival at the hotel he parked his car next to SP7's car. He and the second appellant entered SP7's car because Seman did not get out of the
D car. He saw a black plastic bag placed at the SP7's car handbrake. Both he and the second appellants were later arrested.

The Defence Of The Second Appellant

[10] The second appellant was also a cloth trader. He knew the
E first appellant for over thirty years. On the day in question he accompanied the first appellant to look for car spare parts. On the way the first appellant received a call from Seman requesting the first appellant to pick him up at Hotel Perdana. While at the car park he entered SP7's car together with the first appellant. He
F was also arrested. According to him it was the first time he saw the black plastic bag.

The Appeal

G **[11]** Before this court learned counsel for the first appellant submitted that he would confine his argument in the appeal by the first appellant to two main grounds as follows:

(a) that the non-calling of the informer is fatal to the prosecution's case; and

H

(b) that the identity of the drug exhibits is highly doubtful.

Learned counsel for the second appellant indicated to us at the outset that he would adopt the submission made on behalf of the
I first appellant on the above two main grounds as his points of submission for the second appellant. The second appellant would

also be submitting on the additional ground of common intention under s. 34 of the Penal Code not being proved against the second appellant.

Whether The Non-Calling Of The Informer Is Fatal To The Prosecution's Case

[12] I shall first deal with the first ground of appeal as to whether the non-calling of the informer is fatal to the prosecution's case. The learned trial judge in this case had ruled that the informer had not assumed the mantle of agent provocateur by reason of his role from the beginning to the end. The learned trial judge also ruled that even assuming that the informer had assumed the role of agent provocateur, the prosecution's failure to call him as a witness or offer him to the defence had not created a gap or attracted the adverse presumption rule under s. 114(g) of the Evidence Act. It is the contention of the appellants that the finding of the trial judge is misconceived. To the appellants there was active participation of the informer leading to the arrest of the appellants which can be seen from the facts and circumstances of the case as follows:

(a) The informer's name was revealed in the course of the trial as Mat Isa. He was a Thai Malay. He was also known as Seman to the appellants.

(b) The informer met SP7 at least three times to discuss about the alleged drug activity.

(c) The informer was together with SP7 on the way to the wooden house where SP7 met the first appellant.

(d) The informer called SP7 to pick him up and he was brought to the Perdana Hotel. The informer was present at the scene of arrest.

Learned counsel for the appellants contended that since the identity of the informer was no longer a secret, the so-called protection under s. 40 of the Dangerous Drugs Act 1952 ("the Act") would be superfluous and he cited the case of *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 as the authority for the said proposition.

[13] In the present case, the informer was neither called nor offered to the defence. It is the first appellant's case as stated in his defence that it was the informer who approached, enticed and trapped him. Learned counsel for the appellants submitted that since the informer had turned out to be an agent provocateur, it is therefore incumbent for this person to be called to give evidence. His evidence would be both relevant and material at the defence stage, even though he may not be relevant at the prosecution's stage. Because of his importance to the defence, the prosecution is under obligation to at least offer him for cross-examination or call him for rebuttal evidence. It is important for the appellants because their defence had only the informer as their main witness. It was contended for the appellants by reason of the non-calling of the informer the adverse inference under s. 114(g) of the Evidence Act should be invoked against the prosecution.

[14] The law that governs the issue of agent provocateur and informer is provided for under ss. 40 and 40A of the Act. Section 40 provides as follows:

> 40. (1) Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in any civil, or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.
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> (2) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named or described or which might lead to his discovery, the Court before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.
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> (3) If on trial for any offence under this Act the Court, after full inquiry into the case, is of opinion that the informer willfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the Court is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the Court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

Section 40A provides as follows:

> 40A. (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.
>
> (2) Notwithstanding any rule of law of the provisions of this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

[15] The interpretation and the application of the above provisions of the Act have been discussed in a number of earlier decided cases. (See the cases of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 240, *PP v. Mansor Md Rashid & Anor.* [1997] 1 CLJ 233; *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; *Ghazalee Kassim & Ors. v. PP* [2009] 4 CLJ 737).

[16] From the decision of the above cited cases, the position in law in relation to ss. 40 and 40A of the Act is well settled and clear. The informer is protected from giving evidence whilst an agent provocateur is not protected. In other words, if a person is only an informer, the prosecution is not required to call him as a witness or offering him to the defence. An informer is protected under s. 40 of the Act. On the other hand if a person is an agent provocateur, he is required to give evidence in court as a prosecution witness and if he is not called he has to be offered and made available to the defence. Failure to comply with this requirement will attract the application of adverse inference under s. 114(g) of the Evidence Act against the prosecution's case.

[17] The dispute in the present case is therefore centred on the status of the person called Seman. The question is whether Seman is to be treated as an informer or an agent provocateur. The prosecution contended that Seman is an informer, whilst the defence contended that Seman is an agent provocateur. In

deciding on this issue useful reference may be made to the case of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 21, wherein Mohamed Azmi, SCJ in delivering the judgment of the Supreme Court had this to say:

> ... In our opinion whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case. In the instance case the protection under section 40(1) clearly applies since evidence showed all the informer did was to accompany DPC Lian on the 14th and introduce him to the appellant. Accordingly there is no merit in the argument that the learned Judge ought to have invoked the adverse presumption under section 114(g).

[18] In the case of *PP v. Mansor Md Rashid & Anor.* [1997] 1 CLJ 233, Chong Siew Fai, CJ (Sabah and Sarawak) drew the distinction between an informer and that of an agent provocateur and after having evaluated the facts of the case made some pertinent observations at pp. 253 to 254 as follows:

> ... The learned trial Judge invoked adverse presumptions under section 114(g) of the Evidence Act 1950 for the non-calling of the informer, Cholar, and the co-occupier of the premises, Amran, by the prosecution as witnesses and for failing to offer them to the defence at the close of the prosecution case. His reason for doing so was based on his finding of fact that Cholar's role was not just an informer but was an active participant in the circumstances leading to the commission of the offence because he not only introduced PW9 to the 2nd respondent but was also present during the subsequent transactions involving the one kati and one kilo of cannabis. Before us, it was submitted for the respondents that Cholar as an informer had turned into an agent provocateur, *Namasiyiam & Ors. v. PP* [1987] 2 MLJ 337 was cited in support.
>
> The Act does not define "informer" and "agent provocateur". But the distinction is recognized. (See sections 40 and 40A of the Act).
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> In *Munusamy v. PP* [1987] 1 MLJ 492, Mohd. Azmi SCJ in delivering the judgment of the Court opined that 'whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case.' (page 494). In our instant case under appeal, though Cholar introduced PW9 to the 2nd respondent and was present when both transactions involving cannabis were struck, there is no evidence that he had done anything apart from being present. It appears obvious that

his presence during the negotiation process and the transactions was merely to lend credence to PW9's intention to purchase the cannabis in the minds of the respondents. *Namasiyiam & Ors. v. PP* [1987] 2 MLJ 337, the judgment shows that Francis, the 'informer' (as the police called him throughout the trial) took an active part not only by introducing the agent provocateur to the offenders but also acted as the latter's spokesman and participated in the trap leading to the arrests of the offenders and the seizure of the drugs.

On the particular facts and circumstances of the instant case under appeal, we are of the view that Cholar was not an agent provocateur. But even if he was, there is more than sufficient credible evidence of the respondent's involvement in the negotiation and agreement to sell to PW9 the 902 grammes of cannabis subsequently brought out by the 2nd respondent from room K in the said house.

In the case of Amran, the learned trial Judge relied on the evidence that Amran handed the 1st respondent's rental in advance to PW7 and received the keys of the house from PW7. The trial Judge also relied on the exculpatory statement of the 1st respondent which mentioned about Amran. Evidence adduced shows that Amran had passed the three months advance rental from the 1st respondent to PW7 Azian from whom he received the keys of the house. But this took place on 28 June 1991 - more than one month before the alleged offence. True, in the 1st respondent's exculpatory statement D25, Amran was said to have occupied room 'K' of the house, and the learned trial Judge concluded that Amran had access or occupation of the premises, the fact remains that there is not an *iota* of evidence that Amran had in any way whatsoever involved or participated in the negotiations or sales of the cannabis in any of the occasions. This is of particular importance in view of the basis of the 'trafficking' charge relied on by the prosecution which was one of sale resulting from negotiations. We are of the view that Amran was not an agent provocateur.

[19] In the above case, the Federal Court ruled that both Cholar and Amran are not agent provocateurs. It is to be noted the role played by Cholar and Amran is far more bigger than that of the role played by Seman in the present case. There is no evidence that Seman had done anything apart from introducing SP7 to the first appellant and being present when the transaction involving the drugs took place. Seman's presence if at all is merely to lend

credence of SP7's intention to purchase the drugs in the minds of both the appellants. It is therefore my considered view that Seman is not an agent provocateur in the present case.

[20] As regards the case of *Ti Chuee Hiang v. PP (supra)* cited by the appellants to support their case that Seman is an agent provocateur, it can be discerned from the judgment of the case that before an informer becomes an agent provocateur and no longer enjoy the protection of s. 40 of the Act the following conditions must be satisfied:

(i) he holds the key to the unfolding of events, without which there are gaps in the prosecution's case; and

(ii) his role is the deciding factor in the sale transaction of the drugs.

In the instant case the defence's argument that the informer Seman must be called was to show that it was the informer who actually negotiated the sale of the drugs with SP7 and that his role (the first appellant) was merely to negotiate the supply of jeans. However such crucial defence of the first appellant that he was merely negotiating the supply of jeans was never suggested to SP5 and SP7. The defence's allegation that the negotiation for the supply of the drugs was done between SP7 and Seman was denied by SP7. There was also no suggestion that the first appellant was there merely to supply jeans. As such there can only be one purpose to explain the presence of the first appellant at the wooden house in this case, that is for negotiation with SP7 for the sale of the drugs. It is to be stated here that s. 40 of the Act places an agent provocateur's evidence no less credible than any witness merely by virtue of him being such. The effect therefore is that there was no gap in the prosecution's case as what was available at the close of the prosecution's case was that the informer's role was merely to introduce the first appellant. His presence in the car with SP7 amounts to nothing as he left immediately upon the arrival of both the appellants before the raid.

[21] Still on the issue of whether the failure to call Seman, the informer is fatal to the prosecution's case, I would like to refer to the recent decision of the Federal Court in the case of *Ghazalee Kassim & Ors v. PP* [2009] 4 CLJ 737 wherein on this same issue Zaki Tun Azmi, CJ in delivering the judgment of the court had this to say:

> Who was Ah Meng? Was Ah Meng an informer or was he an agent provocateur? Does it make any difference whether Ah Meng is an informer or agent provocateur? Has the failure of the prosecution to call Ah Meng or offer him as a witness to the defence prejudiced the appellants? On the facts of this case, has it raised any reasonable doubt as to the guilt of the appellants?

[22] The Federal Court, further at p. 745 of the judgment stated as follows:

> Section 40A of the Dangerous Drugs Act, places an agent provocateur's evidence no less credible than any witness merely by virtue of him being such. The reason according to the 3rd appellant why he wanted Ah Meng was to support his defence that he was, at the Lion City Hotel, to meet Ah Meng to collect a gambling debt. According to the 3rd appellant, Ah Meng had a gambling debt amounting to RM25,000 owing to him. Assuming that this is so, why did he count the money brought by the prosecution witness PW10 amounting to RM70,000 instead of just asking for the RM25,000 allegedly owed to him? There was no indication that he questioned why there was RM70,000 instead of RM25,000.

[23] The Federal Court in the above case ruled that based on the facts, the court would not invoke s. 114(g) of the Evidence Act. Similarly, it is my judgment in the present case that the non-calling or the non-offering of the informer by the prosecution had not caused any gap to the prosecution's case as it does not tend to explain the presence of the first appellant other than for the purpose of supplying the drugs to SP7. Therefore, Seman the informer in the present case is afforded the protection under s. 40 of the Act.

Identity Of The Drug Exhibits

[24] I shall now deal with the issue of the identity of the drug exhibits which the appellants alleged as highly doubtful. Learned counsel for the appellants highlighted to us that there are discrepancies in the evidence of the prosecution witness in relation to the said drug exhibits. SP5 in his evidence stated that all the pills that had been seized have markings of "WY" on them. However, SP4, the Chemist stated that out of 3,985 pills examined by him he found only 211 pills having the marking of "R". SP6 the investigating officer did not give evidence on the description and markings on the pills. On cross-examination SP6

stated that he was not sure whether there was any marking on the pills. Learned counsel for the appellants also contended that the doubt created could be overcome or explained if the police report and the search list had been tendered as exhibits. But both the documents were not tendered and produced. Failure to do so called for the invocation of adverse inference under s. 114(g) of the Evidence Act.

[25] The learned trial judge did not find any doubt created in respect of the identity of the pills. He had given his reason for doing so. (See pp. 227-228 of the appeal record). I am of the view there are no flaws as regards the findings and conclusions made by the trial judge on the drug exhibits. It is to be noted that the drug exhibits in this case were counted by SP5 in the presence of both the appellants after they were arrested and there is no suggestion of tampering of the drug exhibits. I am in agreement with the trial judge and the Court of Appeal that there was no doubt as to the identity of the pills that were seized. The pills that were seized by SP5 and subsequently handed over to SP6 and further analysed by SP4, the Chemist are the same pills. The difference in the evidence given by SP4, SP5 and SP6 of the markings on the pills in my view only tends to show the level of observation exercised by a particular witness in examining the said exhibits. It is not unreasonable for two or more witnesses seeing the same object to give a different description. In this case SP4, being a Chemist, it can be said that he would be more observant and detailed in examining the pills as exhibits of the case.

[26] I am also of the view there was no break in the chain of evidence relating to the exhibits. It is clear that the pills that had been seized by SP5 are the same pills that were handed over to SP6 and later sent to SP4 for him to conduct an analysis. Therefore, the question of whether there is the need for the prosecution to produce the search list and the police report to clarify on the identity of the said pills does not arise. No adverse inference under s. 114(g) of the Evidence Act should be made against the prosecution for not producing the search list and the police report.

Common Intention

[27] On the issue of common intention not being proved against the second appellant, learned counsel for the second appellant submitted that the second appellant was not involved at all in the

negotiation for the sale and purchase of the drugs wherein according to the prosecution witnesses the transaction took place between 26 June 2001 and 31 July 2001. The second appellant only appeared at the scene where the alleged offence was committed in this case on 1 August 2001. The question posed was how did the trial judge come to a finding that the common intention of trafficking of the drugs had been established between the first appellant and the second appellant. On this point, I find that the learned trial judge was aware that the second appellant only appeared at the scene of the crime on 1 August 2001. However, the learned trial judge found there was strong evidence and without doubt that both the appellants had the common intention in the trafficking of the said drugs. The learned trial judge gave his reason as follows:

> Dalam kes sekarang ini terdapat bukti yang lebih daripada dipercayai melalui keterangan SP5 dan SP7 bahawa tertuduh kedua telah bertindak secara bersepadu dengan tertuduh pertama dalam penjualan dadah tersebut. SP5 melihat tertuduh kedua keluar bersama tertuduh pertama daripada keretanya dan terus masuk ke kereta SP7. Malahan dialah yang membawa dadah tersebut ke kereta itu dengan menyorokkan di dalam bajunya. Perbuatan beg hitam (P10) mengandungi dadah tersebut dari bahagian dalam bajunya apabila SP7 bertanyakan 'mana barang' kepada tertuduh pertama jelas menunjukkan bukan sahaja tertuduh kedua mempunyai pengetahuan tentang dadah berbahaya yang dibawanya tetapi dia juga mempunyai pengetahuan dadah tersebut adalah untuk dihantarserah (delivering) atau dibekalkan (supplying) atau diedarkan (distributing) kepada SP7, iaitu perbuatan-perbuatan yang termasuk di dalam takrif pengedaran di bawah seksyen 2 Akta. Perbuatannya menentang tindakan anggota polis yang hendak menangkapnya memperkuatkan lagi keterangan mengenai keterlibatannya dalam urusan jualbeli dadah tersebut. (See page 217 of the Appeal Record).

[28] I agree with the above findings of the learned trial judge. I am of the view the presence of the second appellant at the scene where the transaction for the purchase and sale of the drugs took place was not a mere coincidence. To me the second appellant is equally involved. This is based on the fact that on 1 August 2001, it was the second appellant who brought the drugs by concealing it inside his shirt. It was also the second appellant who handed over the drugs to SP7 when SP7 asked him about it.

[29] It is a well established principle of law in dealing with the criminal liability under s. 34 of the Penal Code that a pre-concert or pre-planning may develop on the spot or during the course of the commission of the offence, but the crucial test is that such plan must precede the act constituting the offence. The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case. (See the cases of *Mahbub Shah v. Emperor* AIR [1945] PC 118 and *Suresh v. State of Uttar Pradesh* AIR [2001] SC 1344). In the present case, although the second appellant was not involved in the negotiation for the sale and purchase of the drugs, it is my judgment that the prosecution has established the common intention between the first appellant and the second appellant to commit the offence of trafficking of the said drugs. The pre-arranged plan of the first appellant and the second appellant to commit the offence can be inferred by reference to the acts of both of them meeting SP7 on 1 August 2001 and the fact that it was the second appellant who delivered the drugs to SP7.

Conclusion

[30] For the reasons above stated I would dismiss the appeal of both the appellants. The conviction recorded and the sentence passed by the High Court on both of them and affirmed by the Court of Appeal are hereby affirmed.

[31] My learned brothers Augustine Paul, FCJ and Mohd Ghazali bin Mohd Yusoff, FCJ, have seen this judgment in draft and have expressed their concurrence.